STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9806

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and CLEAN AIR CAROLINA,

Plaintiffs,

vs.

TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity,

Defendants.

MOTION TO STAY
22 FEBRUARY 2019 ORDER

COME NOW Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (collectively, the "Defendants"), by and through the undersigned counsel and pursuant to N.C. Gen. Stat. §§ 1-294 and 1A-1, Rule 62 and Appellate Rule 8, and hereby move for entry of an order staying this Court's 22 February 2019 Order while it is on appeal. In support of this motion, Defendants show the Court as follows:

1. On 22 February 2019, this Court held that the North Carolina General Assembly "lost its claim to popular sovereignty" as of 5 June 2017, and because of that, lacked the power to propose constitutional amendments to the people of North Carolina. (22 February 2019 Order, p.11) This Court characterized the issue as "an

unsettled question of state law and a question of first impression for North Carolina courts." (22 February 2019 Order, p.10) Defendants request that this Court stay its 22 February 2019 Order while the matter is appealed.

2. The purpose of staying this Court's order is to preserve the status quo while the order is on appeal. *See, e.g., Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (point of an injunction is to preserve the status quo of the parties during litigation). The status quo of the jurisprudence known to Plaintiffs, Defendants, and the court in *Covington v. North Carolina*, 270 F. Supp. 3d 881, 901 (M.D.N.C. 2017), prior to 22 February 2019 was that no court—trial or appellate, federal or state—had ever held that a state legislature lacked the ability to make laws due to malapportionment or ill-fated districting. Further, the status quo since 6 November 2018 is that over 2 million North Carolina voters approved a constitutional amendment to reduce the state income tax cap (Session Law 2018-119) and just as many approved an amendment to provide for voter identification (Session Law 2018-128). The amendments were certified as required by law.

3. In considering whether to stay an order and preserve the status quo pending appeal, our appellate courts have adopted a standard similar to that used for preliminary injunctions that preserve the status quo pending trial; courts consider the likelihood of success on appeal and the possibility of irreparable harm or injury without a stay. *See Abbott v. Town of Highlands*, 52 N.C. App. 69, 79, 277 S.E.2d 820, 827 (1981) ("There was some likelihood that plaintiffs would have prevailed on appeal and thus have been irreparably injured. Consequently, we find no abuse of

discretion in the judge's decision to stay the judgment pending appeal."); *N. Iredell Neighbors for Rural Life v. Iredell Cty.*, 196 N.C. App. 68, 79, 674 S.E.2d 436, 443 (2009) ("While no North Carolina court appears to have articulated the standard which a trial court should use when ruling on a Rule 62(c) motion, we hold the two-pronged test articulated by our Supreme Court in *Berry* [discussing the standard for a preliminary injunction] to be applicable.").

4. Defendants submit that there is a likelihood of success on appeal. This Court, like Plaintiffs, looked to the decisions in *Covington, infra,* for guidance. The *Covington* federal district court found that 2011 majority black legislative districts constituted racial gerrymanders but did not prohibit the use of those districts for the 2016 election. *Covington v. North Carolina*, 316 F.R.D. 117, 176-78 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017). The United States Supreme Court affirmed this finding of the district court but vacated the district court's requirement for a special election. *North Carolina v. Covington*, __ U.S. __, 137 S. Ct. 2211 (2017); *North Carolina v. Covington*, __ U.S. __, 137 S. Ct. 1624, 1626 (2017). By vacating the district court's requirement for a special election, the United States Supreme Court must have acknowledged that the General Assembly would continue to be able to act until the next election.

5. On remand, the district court denied the request for a special election due to likely confusion. *Covington v. North Carolina*, 270 F. Supp. 3d 881, 902 (M.D.N.C. 2017). The district court specifically declined to rule on the issue of whether improper redistricting would invalidate laws passed by the North Carolina

General Assembly, and none of the decisions in the *Covington* cases suggest that the North Carolina Legislature could not act.

6. Other courts have held that, under similar circumstances, the legislature can act. At least one North Carolina court has found that a collateral attack on a law based on the validity of the state legislature that passed it to be a political question. *See Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316, 319 (1939); *see also People v. Clardy*, 165 N.E. 638, 640–41 (Ill. 1929); *Territory v. Tam*, 36 Haw. 32 (1942).

7. Other appellate courts, including the United States Supreme Court on multiple occasions, have explicitly rejected the argument, *see, e.g., Baker v. Carr*, 369 U.S. 186, 250 n. 5 (1962) (Douglas, J., concurring) ("a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act."); *Ryder v. United States*, 15 U.S. 177, 183 (1995) (acknowledging prior holding in *Connor v. Williams*, 404 U.S. 549, 550-51 (1972)); *Buckley v. Valeo*, 424 U.S. 1, 142 (holding legislative acts performed by legislators elected in accordance with unconstitutional apportionment plan are given de-facto validity); *Ryan v. Tinsley*, 316 F.2d 430, 432 (10th Cir. 1963) ("Nothing in *Baker v. Carr*, 369 U.S. 186, intimates that a legislature elected from districts that are invidiously discriminatory in violation of the Fourteenth Amendment is without power to act."); *Dawson v. Bomar*, 322 F.2d 445, 446 (6th Cir. 1963); *Martin v. Henderson*, 289 F. Supp. 411, 414 (E.D. Tenn. 1967) (holding malapportioned legislature is nonetheless still empowered to act); *Everglades Drainage League v. Napoleon B. Broward Drainage Dist.*, 253 F. 246,

252 (S.D. Fla. 1918), *State v. Latham & York,* 190 Kan. 411, 426, 375 P.2d 788 (1962), *cert. denied,* 373 U.S. 919 (1963) ("the fact that a legislature has not reapportioned in accordance with the state constitution does not preclude it from making any law or doing any act within the legislative competence.... Any other conclusion would result in the destruction of state government."). Thus, looking beyond *Covington*, it is likely that an appellate court will disagree with this Court's conclusion that the General Assembly lacked the ability to pass laws.[1]

8. Without a stay, the status quo that has existed for some time changes overnight, as the parties (and all of North Carolina) await final appellate action on the issue. The votes in favor of the two amendments (2,094,924 in favor of the income tax amendment and 2,049,121 in favor of the voter identification amendment) are cast aside. And the precedent created by this decision casts doubt on even more laws and sows public confusion. For instance, *Independent Weekly* has already noted that "the logic [of the Court's opinion] would seem to apply to the two others that passed—Marsy's Law and the amendment guaranteeing the right to hunt and fish—should anyone challenge them." https://bit.ly/2IBLHRW. Counsel for Plaintiffs practically conceded as much when questioned on that topic by this Court. (*See* 15 January 2019 Transcript of Oral Argument, p. 44.)

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[1] In fact, the three-judge superior court panel that also reviewed this argument as a part of Plaintiffs' direct attack on the amendments at issue unanimously noted that, if it did have jurisdiction over Plaintiffs' usurper argument, it would reject it. *See* August 21, 2018 Order on Injunctive Relief.

9. Moreover, the Court's rationale is not limited to constitutional amendments. This Court concluded that "[a]n illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state's Constitution." (22 February 2019 Order, p. 12.) The North Carolina Constitution allows the General Assembly to initiate constitutional amendment "only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection." N.C. Const. art. XIII, § 4. A three-fifths majority is also required to override a gubernatorial veto. N.C. Const. art. II, § 22. The General Assembly has overridden numerous gubernatorial vetoes since 5 June 2017 (when the Supreme Court affirmed the finding of racial gerrymandering) including the following:

- Session Law 2017-57 (enacting the present state budget);
- Session Law 2018-146 (establishing the current State Board of Elections, which, as of 21 February 2019, has ordered a new election in the 9th congressional district); and
- Session Law 2018-2 (establishing the State Board of Elections and Ethics Enforcement, which certified all other races and referenda in the November 2018 election).

The Court's order opens up these laws (and others[2]) to similar arguments of impropriety and collateral attacks, and creates confusion that could lead to increased (and unnecessary) litigation over laws, judicial decisions, and regulatory appointments.

10. The practical realities of this Court's decision are not just limited to the past. The Court's order noted that "[t]he November 6, 2018 election was the first to be held under the remedial maps approved by the federal courts to correct the 2011 unconstitutional racial gerrymander." (22 February 2019 Order, p. 12.) Plaintiffs had similarly described the 2018 election as "the first opportunity that voters have had since before 2011 to choose representatives based on legislative maps that have not been found to be the product of an unconstitutional racial gerrymander." (Plaintiffs' Brief at 7.) However, the NAACP and other plaintiffs continue to challenge North Carolina's legislative districts for mid-decade redistricting and as political gerrymanders. In *NAACP v. Lewis*, Wake County Superior Court Case No. 18 CVS 2322, a three-judge panel found that the redrawing of four Wake County districts was not necessary to comply with federal law and violated the State Constitution's prohibition on mid-decade redistricting. The three-judge panel's 2 November 2018 order, issued just four days before the 2018 general election, allowed the General Assembly "a period of time to remedy the defects in the Wake County House Districts," requiring new districts for use in the 2020 general election.

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[2] Indeed, because the challenged districts were drawn in 2011, the rationale of the Court's order calls into question all acts of the General Assembly after legislators enacted pursuant to the challenged districts were seated in January of 2013.

11. Similarly, in *Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), the federal district court's holding that the state's redistricting plan constituted partisan gerrymandering is currently on appeal, and a suit was filed in November 2018 alleging that maps drawn in 2017 violate the North Carolina Constitution due to partisan gerrymandering, *see Common Cause v. Lewis*, Wake County Superior Court Case No. 18 CVS 14001.

12. Given the final mandate that four Wake County districts are defective and the challenges to other districts, the rationale set forth in this Court's 22 February 2019 Order could open the door for challenges to legislation passed by the current General Assembly.

13. Confusion regarding whether a law of the General Assembly is valid; constant questions regarding the far-reaching implications of this Court's order; and, the likely increase in legal challenges are each irreparable harms to the people of North Carolina that cannot be recouped and are each instantly tempered by staying the 22 February 2019 Order through appeal. Finality of a constitutional question under North Carolina law comes from our appellate courts. Staying this Court's 22 February 2019 Order allows our appellate courts to weigh this Court's order under the same status quo this Court and the people of North Carolina enjoyed as recently as last week.

WHEREFORE, Defendants respectfully pray that this Court grant Defendants' Motion to Stay this Court's 22 February 2019 Order while on appeal and until further order of this Court or an appellate court.

This the 26th day of February, 2019.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

D. Martin Warf
N.C. State Bar No. 32982
Noah H. Huffstetler, III
N.C. State Bar No. 7170
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 329-3800
Facsimile: (919) 329.3799
noah.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com

Attorneys for Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing ***Motion to Stay*** was served upon the persons indicated below via electronic mail and U.S. Mail addressed as follows:

Alexander McC. Peters
Senior Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
apeters@ncdoj.gov

Derb Carter
Kimberley Hunter
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
derbc@selcnc.org
khunter@selcnc.org

Irving Joyner
P.O. Box 374
Cary, NC 27512
ijoyner@nccu.edu

Daryl Atkinson
Leah Kang
Forward Justice
400 W. Main Street, Suite 203
Durham, NC 27701
lkang@forwardjustice.org

This the 26th day of February, 2019.

D. Martin Warf